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Supreme Court, U.S.
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No. 09-591

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In The
# Supreme Court of the United States

DOMINICK PIZZONIA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. How is the scope of a RICO conspiracy, 18 U.S.C. § 1962(d), determined?

2. Where, as Department of Justice guidelines instruct, the pattern of racketeering activity is pleaded to have "consisted of" specified predicate acts constituting the pattern "through which" the defendants "agreed" to conduct of the affairs of the alleged enterprise, whether such pleading defines the scope of the RICO conspiracy, or whether, as the court of appeals held, "the government was not limited to the predicate acts that were pleaded to demonstrate the intended pattern"?

3. Whether "the totality-of-the-circumstances approach to identifying a pattern of racketeering activity" adopted by the court of appeals, so that the pattern and the scope of a RICO conspiracy may be determined by reference to the pleading's broad description of the "affairs of the enterprise," broadens the basis for conviction beyond the pleading and the statute?

4. Does the "continuity" required to establish a "pattern" of racketeering activity under RICO serve to prove "continuing criminal activity," so that the statute of limitations for RICO conspiracy is extended indefinitely?

## PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

TABLE OF CONTENTS

Page

Questions Presented ..... i

Parties to The Proceeding Below ..... ii

Table of Authorities ..... iv

Opinion Below ..... 1

Jurisdiction ..... 1

Statutory Provisions Involved ..... 1

Statement of The Case ..... 2

Reasons for Granting The Petition ..... 8

Conclusion ..... 19

Appendix

Opinion of the United States Court of Appeals for the Second Circuit, August 19, 2009 ..... 1

Transcript of District Court Ruling on Post-Trial Motion, September 5, 2007 ..... 25

## TABLE OF AUTHORITIES

Page

CASES

*Boyle v. United States*, 556 U.S. ___, 129 S. Ct. 2237 (2009) ..... 12, 14

*Grunewald v. United States*, 353 U.S. 391 (1957) ..... 16, 18

*H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989) ..... 6, 17, 18

*Krulewitch v. United States*, 336 U.S. 440 (1946) ..... 13, 15

*Stirone v. United States*, 361 U.S. 212 (1960) ..... 17

*Toussie v. United States*, 397 U.S. 112 (1970) ..... 15, 18

*United States v. Korfant*, 771 F.2d 660 (2d Cir. 1968) ..... 14, 15

*United States v. Lopez*, 356 F.3d 463 (2004) ..... 14

*United States v. Miller*, 471 U.S. 130 (1985) ..... 16

*United States v. Persico*, 832 F.2d 705 (2d Cir. 1987) ..... 5

*United States v. Russotti*, 717 F.2d 27 (2d Cir. 1983) ..... 5, 6

*United States v. Turkette*, 452 U.S. 576 (1981) ..... 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

18 U.S.C. § 371 ..... 13

18 U.S.C. § 1962 ..... *passim*

28 U.S.C. § 1254 ..... 1

Fed. R. Crim. P. 29 ..... 4

MISCELLANEOUS

"Racketeer Influenced & Corrupt Organizations: A Manual for Federal Prosecutors" (4th rev. ed. 2000) ..... 9

## PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINION BELOW

The United States Court of Appeals for the Second Circuit, in an opinion reported at 577 F.3d 455 and reproduced in the appendix at App. 1, affirmed the judgment of the United States District Court for the Eastern District of New York, convicting Petitioner of RICO conspiracy in violation of 18 U.S.C. § 1962(d) and sentencing him principally to 180 months' imprisonment.

## JURISDICTION

The judgment of the court of appeals was entered on August 19, 2009. This petition for a writ of certiorari is being timely filed within ninety days of that judgment in compliance with Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

## STATUTORY PROVISIONS INVOLVED

Title 18 United States Code, Section 1962, provides in pertinent part:

. . . .

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Title 18 United States Code, Section 3282, provides in pertinent part:

> (a) In general. – Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

## STATEMENT OF THE CASE

1. In 2007 a jury found Petitioner guilty of a single count of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO conspiracy"), in violation of 18 U.S.C. § 1962(d). The indictment, which was filed on May 26, 2005, and later superseded, alleged that Petitioner, codefendant Alfred DiCongilio and others, as members of "the

Gambino organized crime family of La Cosa Nostra," conspired to participate in the affairs of that enterprise through a pattern of racketeering activity. The indictment specified:

> 16. The pattern of racketeering activity through which defendants DOMINICK PIZZONIA and ALFRED DICONGILIO agreed to conduct the affairs of the enterprise *consisted of* the racketeering acts set forth as racketeering acts one through seven of this Superseding Indictment. The defendants agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise. (COA App. 25; emphasis added.)

Racketeering Acts One through Seven alleged that Petitioner had committed the following acts: (1) conspiracy to murder and the murder of Frank Boccia from 1987 through June 1988; (2) conspiracy to murder Rosemary and Thomas Uva from September 1992 through December 24, 1992, and the murder of Rosemary Uva on December 24, 1992; (3) the murder of Thomas Uva on December 24, 1992; (4) conspiracy to collect extensions of credit extortionately from John Doe #1 between 1995 and 1996; (5) conspiracy to collect extensions of credit extortionately from John Doe #2 between December 1999 and May 2000; (6) making extortionate extensions of credit to John Doe #3 and collecting and attempting to collect extensions of credit extortionately from John Doe #3 between 2001 and June 2002; and (7) participating in an illegal gambling business

between January 1994 and January 1996. DiCongilio was alleged to have committed only acts One and Seven.

The jury found Petitioner guilty of RICO conspiracy, but found only two racketeering acts proven: Racketeering Act Two (conspiracy to murder Rosemary and Thomas Uva from September 1992 through December 24, 1992) and Racketeering Act Seven (participating in an illegal gambling business between January 1994 and January 1996). DiCongilio was acquitted.

2. After trial, Petitioner moved pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal on statute of limitations grounds, since the only racketeering acts found proven were, by the terms of the indictment itself, completed on December 24, 1992, and in January 1996, respectively, more than five years before the indictment was filed on May 26, 2005. Petitioner contended that the indictment limited the scope of the RICO conspiracy by alleging that the pattern of racketeering activity through which he agreed to conduct the affairs of the enterprise "consisted of" only the seven predicate acts alleged. The district court denied the motion, concluding that "the defendant continued to be a member of this conspiracy," "never abandoned the conspiracy," and "never withdrew from it," and that "the conspiracy continued to and through the time of the trial." (App. 25-26)

3. On Petitioner's appeal, the court of appeals rejected his statute of limitations claim, applying the following multi-layered analysis. Although the indictment alleged that the pattern of racketeering activity through which the defendants agreed to conduct the affairs of the enterprise "consists of" the racketeering acts set forth as racketeering acts one through seven, "the government was not limited to the predicate acts that were pleaded to demonstrate the intended pattern." (App. 11) Under the court of appeals' own precedent, *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), "'the agreement proscribed by section 1962(d) is [a] conspiracy to participate in a charged enterprise's affairs' through a pattern of racketeering activity, 'not [a] conspiracy to commit predicate acts.'" (App. 13-14, *citing id.* at 713 (brackets the court's).) Under another of its precedents, *United States v. Russotti*, 717 F.2d 27 (2d Cir. 1983), "'it is neither the enterprise standing alone nor the pattern of racketeering activity by itself which RICO criminalizes,' but '[r]ather, the combination of these two elements.'" (App. 15, *citing id.* at 33 (brackets the court's).) From these premises, the court concluded:

> It follows, then, that the pattern of racketeering activity cannot by itself define a § 1962(d) conspiracy. To understand the scope of the jointly undertaken scheme, one must also consider the enterprise that the conspirators agreed to conduct through a pattern of racketeering activity. (App. 15)

Consequently, the court reasoned, the "temporal requirement" of RICO conspiracy can be satisfied by means other than "evidence of predicate acts occurring within the limitations period." (App. 15) Borrowing from the double jeopardy jurisprudence of several circuit courts – including its own in *United States v. Russotti*, 717 F.2d 27 – concerning whether successive RICO prosecutions were for the same offense, the court adopted a "totality-of-circumstances approach to identifying a pattern of racketeering activity" (App. 16), notwithstanding that Petitioner's indictment specified that the pattern of racketeering activity "consists of" the seven enumerated predicate acts. (App. 16)

To support its conclusion that even where "a pattern is pleaded to have 'consisted of' or 'included' specified predicate acts, the completion of those predicate acts does not, as a matter of law, dictate the end of the pattern" (App. 20), the court engrafted onto the determination of the temporal scope of a RICO pattern – and thus the temporal scope of a RICO conspiracy – the concept of "continuity" that this Court held in *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989), was a requirement, together with "relatedness," for proving that two or more acts formed a "pattern," as opposed to being isolated or sporadic. One indicium of such continuity, the court of appeals pointed out, is "if the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." (App. 19, *quoting id.* at 242.) Such a threat "can be established where

discrete predicates 'can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.'" (App. 19, *quoting id.* at 243.)

Observing that "[t]his is such a case," the court of appeals held that "where, as here, the affairs of the enterprise in which a defendant agreed to participate through a pattern of racketeering activity are broadly defined to encompass all its criminal money-making objectives and all means used to protect those objectives, the conspiracy does not end, as a matter of law, with the last proved predicate." (App. 20)

The court, while acknowledging that the jury had not been so instructed, added that "in any event a racketeering conspiracy, like any other conspiracy, is presumed to continue until it achieves its criminal object, and the object of a racketeering conspiracy is to conduct the affairs of a charged enterprise through a pattern of racketeering activity, not to commit discrete predicate acts." (App. 3, 20-21)

The court summarized its holding as follows:

> We here hold simply that the Indictment's pleading that a pattern "consisted of" specified predicate acts (1) did not preclude a jury from considering those predicates in light of the totality of the evidence to determine whether they manifested a pattern of continuing criminal activity through which the conspirators agreed to conduct the enterprise's affairs and, accordingly, (2) did not limit the temporal scope of the charged

racketeering conspiracy to the time-frame of those predicates. (App. 23-24)

"In light of this ruling," the court added, "no further discussion is necessary for us to reject as meritless Pizzonia's argument that [the district court] constructively amended the charged conspiracy by allowing the jury to consider its continuance beyond the last proved predicate." (App. 22 n.6)

## REASONS FOR GRANTING THE PETITION

### The Court of Appeals' Holding – Which Is Fundamentally at Odds with The Department Of Justice's Own Guidelines for RICO Conspiracy Indictments – Threatens Radical Consequences for All RICO Conspiracy Cases.

1. Although this is a criminal case involving La Cosa Nostra, the court of appeals' venturesome and logically forced opinion threatens radical consequences for all RICO conspiracy cases, criminal and civil, because: (1) it adopts a "totality-of-circumstances approach to identifying a pattern of racketeering activity" (App. 18) notwithstanding that the pleading expressly identifies the pattern of racketeering activity as "consisting of" specific enumerated predicate acts; (2) it determines the scope of a RICO conspiracy by reference to the pleading's broadly worded description of the affairs of the *enterprise* rather than by the pleaded pattern of racketeering activity "through which the defendants . . . agreed" to conduct

of the affairs of the enterprise; and (3) it conflates the concept of "continuity" required to *form* a pattern and the concept of "continuing," so as to project the pattern of racketeering activity and extend the statute of limitations indefinitely.

Certiorari should be granted to settle whether the RICO conspiracy statute, which is broad indeed, is as boundless as the court of appeals has made it.

2. The reason the pleading here alleged that the pattern of racketeering activity through which the defendants agreed to conduct the affairs of the enterprise "consists of" the racketeering acts set forth as racketeering acts one through seven is that this articulation reflects the Department of Justice's understanding and policy that the scope of a RICO conspiracy is defined by the specific pattern of racketeering activity alleged.

In "Racketeer Influenced & Corrupt Organizations: A Manual for Federal Prosecutors" (4th rev. ed. 2000), prepared by the staff of the Organized Crime and Racketeering Section of the Department of Justice "to assist federal prosecutors in the preparation and litigation of cases involving [RICO]," *id.* at i, prosecutors are instructed, "most important[ly] in RICO conspiracy counts," that "[t]he pattern of racketeering should be drafted to allege that it 'consists of' rather than 'includes' the acts of racketeering to avoid double jeopardy problems in the event a RICO defendant is charged with a subsequent RICO violation and to clearly indicate the charged predicate

acts that may be relied upon to establish the requisite pattern of racketeering activity." *Id.* at 221-22 (footnotes omitted).

Department of Justice policy statements, of course, are not binding, and the manual quoted here says as much. *Id.* at ii. But when those responsible for instructing federal prosecutors on the interpretation and implementation of the RICO statute hold a view significantly divergent from a court's, their view warrants serious consideration.

The Department of Justice's caution that a RICO conspiracy be circumscribed by the pleaded pattern of racketeering activity, so that subsequent RICO conspiracy indictments may be brought against the same person within the same enterprise without offending the double jeopardy clause, is at odds with: the court of appeals' determination that "the government was not limited to the predicate acts that were pleaded to demonstrate the intended pattern" (App. 11); the court's adoption of a "totality-of-circumstances approach to identifying a pattern of racketeering activity" (App. 18); and the court's view that a person's participation in a RICO conspiracy continues for as long as he or she continues to participate in a broadly defined RICO enterprise. (App. 19-20)

As to the double jeopardy concerns, the court of appeals candidly acknowledged that "the question may not admit a ready answer." (App. 16) It certainly may not, since the court's analysis forces the conclusion that a RICO conspiracy has no ending as

long as the enterprise continues to exist, so that a person who has been prosecuted for that RICO conspiracy could not be prosecuted for it again despite committing subsequent racketeering acts, precisely the outcome which the Department of Justice's Organized Crime and Racketeering Section seeks to avoid.

3. The court of appeals conflates the "pattern" and "enterprise" elements in attempting to define the scope of the RICO conspiracy by reference to the pleading's description of the enterprise's diverse purposes and means. (App. 4-5) The terms of the RICO conspiracy statute are abandoned when the court states that "where, as here, the affairs of the enterprise in which a defendant agreed to participate through a pattern of racketeering activity are broadly defined to encompass all its criminal money-making objectives and all means used to protect those objectives, the conspiracy does not end, as a matter of law, with the last proved predicate." (App. 20) Section 1962(d), makes it unlawful to agree to violate § 1962(c), which in turn makes it unlawful "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs *through a pattern of racketeering activity*." (Emphasis added.) Thus, when the indictment here alleged that "[t]he pattern of racketeering activity *through which* defendants DOMINICK PIZZONIA and ALFRED DICONGILIO *agreed* to conduct the affairs of the enterprise consisted of the racketeering acts set forth as racketeering acts one through seven of this Superseding

Indictment," it was faithfully following the statute, not just Department of Justice policy.

The court of appeals employs forced logic when, from the premise that it is neither the enterprise standing alone nor the pattern of racketeering activity by itself which RICO criminalizes, but rather the combination of these two elements (App. 15), the court deduces that "[i]t follows, then, that the pattern of racketeering activity cannot by itself define a § 1962(d) conspiracy" and "[t]o understand the scope of the jointly undertaken scheme, one must also consider the enterprise that the conspirators agreed to conduct through a pattern of racketeering activity." (App. 15) Of course, the enterprise is an element of the offense, and one must consider the nature of the enterprise to comprehend the nature of the conspiracy. But it does not "follow" from the enterprise being an element that the *scope* of the specific conspiracy alleged in the indictment – and particularly the temporal scope – is determined by the allegations describing the enterprise, especially given "[t]he breadth of the 'enterprise' concept in RICO." *Boyle v. United States*, 556 U.S. ___, 129 S.Ct. 2237, 2246 (2009).

The indictment's liberally descriptive language about the means, methods and objectives of the enterprise is something the jury is never asked to pass upon. Indeed, the jury here was specifically instructed that "[t]he government is not required to

prove each allegation about the enterprise or the manner in which it operated."[1] (Trial Transcript at 4769) In nevertheless resorting to that broad language in order to expand the conspiracy beyond the pleaded pattern of racketeering activity, the court of appeals expands the scope of the statute, in much the same way that in *Krulewitch v. United States*, 336 U.S. 440 (1946), the Second Circuit had expanded the scope and the duration of a general conspiracy, under now 18 U.S.C. § 371, by creating the notion of a incidental and never-ending "implicit conspiracy" to conceal the crime, a notion rejected by this Court. *Id.* at 443. A jury's mere finding that the charged enterprise *existed* cannot serve to establish that the charged pattern of racketeering activity was broader than alleged.

4. In the court's adoption of a "totality-of-circumstances approach to identifying a pattern of racketeering activity" (App. 18) any distinction between the enterprise and the pattern – and ultimately between the enterprise and the conspiracy – is lost. As this Court has made clear, "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages," *United States v. Turkette*, 452 U.S. 576, 583 (1981), even though the proof used to

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[1] The only attribute of the charged enterprise that the jury was instructed it must pass upon was whether interstate or foreign commerce would be affected by the enterprise's activities. (COA App. 37)

establish these separate elements may in particulars cases coalesce. *Id.*; *see also Boyle v. United States*, 556 U.S. at ___, 129 S.Ct. at 2245.

It is misguided for the court of appeals to borrow from its double jeopardy jurisprudence the "totality-of-circumstances approach" used for inquiring whether successive RICO prosecutions charge the same pattern of racketeering activity and thus whether they charge the "same offense." This approach is employed most frequently and gainfully in successive conspiracy prosecutions through consideration of what is referred to in the Second Circuit as the "*Korfant* factors." *See United States v. Lopez*, 356 F.3d 463, 467 (2d Cir. 2004), *citing United States v. Korfant*, 771 F.2d 660, 662 (2d Cir. 1968).[2] As the court of appeals notes, "[o]ur sister circuits have adopted similar holistic approaches." (App. 17, *citing* cases.) But that

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[2] The *Korfant* factors are "(1) The criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies." *Korfant*, 771 F.2d at 662.

The factors employed by the court of appeals here are substantially the same: "(1) the time of the various activities charged as parts of separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place under each charge." (App. 17)

"totality-of-circumstances approach" is useful where successive indictments *appear* to charge different offenses but in reality may not. As the court of appeals itself explained in *Korfant*, those factors are "relevant to the task of individuating conspiracies." *Id.* at 662. They are not relevant to determining the scope of a single RICO conspiracy where the indictment itself sets forth what the pattern of racketeering activity through which defendants agreed to conduct the affairs of the enterprise "consists of." That formulation itself "individuates" the conspiracy.

5. The court of appeals' apparently alternate holding, similarly boundless, that "in any event a racketeering conspiracy, like any other conspiracy, is presumed to continue until it achieves its criminal object, and the object of a racketeering conspiracy is to conduct the affairs of a charged enterprise through a pattern of racketeering activity, not to commit discrete predicate acts" (App. 3) also threatens to eliminate any ending or any statute of limitations for RICO conspiracy. *See Krulewitch v. United States*, 336 U.S. at 456 (Jackson, J., concurring) ("the assumption of an indefinitely continuing offense would result in an indeterminate extension of the statute of limitations").

Of course, conspiracy is generally a continuing crime, *see Toussie v. United States*, 397 U.S. 112, 122 (1970), but not an endless one. "[T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines . . . the duration of the

conspiracy." *Grunewald v. United States*, 353 U.S. 391, 397 (1957). Here, if the charged pattern of racketeering activity determined the scope of the conspiracy, as Petitioner maintains, then that conspiracy ended when the last charged and proven predicate act was completed in January 1996.

6. Petitioner's challenge to the district court's jury charge as amending the indictment by allowing the jury to consider conduct beyond the last proven predicate was rejected by the court of appeals "in light of our ruling." (App. 20 n.6) Yet the ruling – that although the indictment alleged that the pattern of racketeering activity through which the defendants agreed to conduct the affairs of the enterprise "consists of" the racketeering acts set forth as racketeering acts one through seven, "the government was not limited to the predicate acts that were pleaded to demonstrate the intended pattern" (App. 11) – itself amends the indictment, because it operates to "broaden the possible bases for conviction from that which appeared in the indictment." *United States v. Miller*, 471 U.S. 130, 138 (1985).

Such broadening of the bases for conviction is evident in the court of appeals' statement that that "the Indictment's pleading that a pattern 'consisted of' specified predicate acts (1) did not preclude a jury from considering those predicates in light of the totality of the evidence to determine whether they manifested a pattern of continuing criminal activity through which the conspirators agreed to conduct the enterprise's affairs and, accordingly, (2) did not limit

the temporal scope of the charged racketeering conspiracy to the time-frame of those predicates." (App. 21-22). This broadening "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Id.* at 140, *citing Stirone v. United States*, 361 U.S. 212, 217 (1960).

7. The court of appeals also mixed apples and oranges when it held that "the *threat* of continued criminal activity" (App. 19; emphasis added) stops the statute of limitations from running on a RICO conspiracy since this Court stated in *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. at 242-43, that the "continuity" requirement of RICO's pattern element may be proved by predicate acts that "themselves include a specific threat of repetition extending indefinitely into the future" or by predicate acts that "can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." (App. 19-20) Thus, according to the court of appeals, the fact that the two proved predicate acts – the Uva murder conspiracy and the gambling operation – were completed did not mean that the charged RICO conspiracy achieved its objective with their completion, in that the "affairs of the enterprise" were "broadly defined to encompass all its money-making objectives and all means used to protect those objectives," thus "posing an open-ended *risk* of continuing criminal conduct." (App. 18-20; emphasis added.)

The statute of limitations and the "continuity" requirement for a pattern of racketeering activity

serve different purposes. "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions," and "statutes of limitations normally begin to run when the crime is complete." *Toussie v. United States*, 397 U.S. at 114 (citations and internal quotation marks omitted.) When the crime is complete, the mere *threat* that the same type of criminal conduct could recur would not toll the statute of limitations. Of course, where the crime is a "continuing offense" – and conspiracy *can* be a "continuing offense" – the statute of limitations is tolled. *Id.* at 115. But even a conspiracy is a completed crime when its purposes have been accomplished. *Grunewald v. United States*, 353 U.S. 391.

The purpose of the "continuity" requirement for establishing a "pattern" of racketeering activity is to ensure that a person is not subjected to RICO's sanctions for separated and isolated criminal offenses. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. at 239. Thus a "pattern" requires a showing that the predicate acts are related and pose a threat of continuing criminal activity. *Id.* Such a threat, together with relatedness, suffices to establish that two or more acts form a pattern, but nothing about that threat establishes that the crime has not been completed, or, in other words, that it tolls any statute of limitations.

The court of appeals conflated two distinct doctrines by engrafting the concept of "continuity" onto

the determination of the temporal scope of a RICO conspiracy.

Certiorari should be granted to consider how the scope of a RICO conspiracy is determined.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
November 13, 2009

Respectfully submitted,

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**UNITED STATES OF AMERICA, Appellee,**

**-v.-**

**DOMINICK PIZZONIA, Defendant-Appellant.**

**Docket No. 07-4314-cr**

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

***577 F.3d 455; 2009 U.S. App. LEXIS 18637***

**September 25, 2008, Argued**
**August 19, 2009, Decided**

**COUNSEL:** JOEY LIPTON, Assistant United States Attorney (Peter A. Norling, Paige Petersen, Assistant United States Attorneys, of counsel), for Benton J. Campbell, United States Attorney for the Eastern District of New York, Brooklyn, New York, for Appellee.

DIARMUID WHITE (Brendan White, of counsel), White & White, New York, New York, for Defendant-Appellant.

**JUDGES:** Before: CALABRESI, STRAUB, and RAGGI, Circuit Judges.

**OPINION BY:** REENA RAGGI

## OPINION

REENA RAGGI, *Circuit Judge*:

Defendant Dominick Pizzonia appeals from a judgment of conviction for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act

(RICO), which was entered on October 2, 2007, by Judge Jack B. Weinstein after a jury trial in the United States District Court for the Eastern District of New York. *See* 18 U.S.C. § 1962(c)-(d). Presently incarcerated serving a 15-year prison term, Pizzonia invokes the statute of limitations to challenge his conviction. He contends that the indictment limited the scope of the charged conspiracy to seven predicate acts. Because the jury found only two of these acts proved, both of which fell outside the relevant limitations period, Pizzonia submits that the district court erred in denying his post-verdict motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29.

The argument is unconvincing for several reasons: (1) the indictment alleged that it was the pattern of racketeering – not the conspiracy itself – that consisted of the charged predicate acts; (2) a racketeering conspiracy is a concept distinct from (a) the pattern of racketeering through which the conspirators agree to participate in the affairs of the charged enterprise, and (b) the predicate acts that may evidence the pattern; (3) while predicate acts within the limitations period can demonstrate the racketeering conspiracy's existence during that time, this temporal requirement can also be satisfied by other evidence; (4) a jury properly views predicate acts in light of the totality of the circumstances to determine whether they manifest the threat of continued criminal activity essential to prove a pattern of racketeering, and such circumstances, no less than the predicate acts themselves, can prove a conspiracy's

existence beyond the conclusion of the last predicate act; and (5) in any event, a racketeering conspiracy, like any other conspiracy, is presumed to continue until it achieves its criminal object, and the object of a racketeering conspiracy is to conduct the affairs of a charged enterprise through a pattern of racketeering, not to commit discrete predicate acts.

As Judge Weinstein correctly observed, even though the predicate acts proved in this case were outside the statute of limitations, other trial evidence permitted the jury to conclude that both the charged racketeering conspiracy and Pizzonia's membership in it continued into the limitations period. *See* Sentencing Tr. at 12 (Sept. 5, 2007). Accordingly, we affirm the judgment of conviction.

## I. Background

### A. The Relevant Limitations Period

On May 26, 2005, a federal grand jury in the Eastern District of New York returned an indictment against Pizzonia for the racketeering conspiracy at issue in this case. Thus, all parties agree that pursuant to the five-year statute of limitations established by 18 U.S.C. § 3282, the government was required to prove Pizzonia's participation in the conspiracy sometime after May 26, 2000.

B. The Fourth Superseding Indictment

Pizzonia ultimately stood trial on a fourth superseding indictment returned on December 7, 2006 ("the Indictment"). Thus, we focus on the language of that pleading on this appeal.

The Indictment charged that from approximately 1987 through September 2005, Pizzonia, co-defendant Alfred DiCongilio, and others employed by or associated with a specific enterprise, to wit, the "Gambino organized crime family of La Cosa Nostra," Indictment ¶ 1, "conspired to . . . conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity," *id.* ¶ 15. The Indictment stated that the "principal purpose" of the Gambino crime family was "to generate money for its members and associates" through a wide range of criminal activities, "including extortion, illegal gambling, interstate transportation of stolen goods, loansharking, narcotics trafficking and robbery." *Id.* ¶ 10.[1] To further these criminal moneymaking activities, Gambino members and associates would engage in still other crimes, some involving the use and threatened use of "physical violence,

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[1] This enterprise, one of five organized crime families composing the New York City area Mafia, *see United States v. Eppolito*, 543 F.3d 25, 28 (2d Cir. 2008) (identifying Bonanno, Colombo, Gambino, Genovese and Lucchese crime families as composing New York City Mafia), has figured in other racketeering cases before this court, *see, e.g.*, *United States v. Yannotti*, 541 F.3d 112, 115 (2d Cir. 2008).

including murder." *Id.* The Indictment identified a number of secondary enterprise objectives for which Gambino members and associates also employed criminal means, including violence and murder, i.e., to settle personal grievances and vendettas, to prevent detection by law enforcement, and to coordinate criminal activities with other organized crime families. *See id.* ¶¶ 11-13.

The Indictment alleged that the Gambino family operated through various "crews," which consisted of a number of "made" family members (sometimes referred to as "soldiers") as well as associates. *Id.* ¶ 2. Each crew was headed by a captain. Each captain reported to the family "boss," who was himself assisted by an "underboss" and a "consigliere" in supervising and protecting the family's overall activities. *Id.* ¶¶ 2-5. At various times, Pizzonia served as "a captain, acting captain, soldier or associate within the Gambino family." *Id.* ¶ 8.

The Indictment charged that the "pattern of racketeering activity through which the defendants . . . agreed to conduct the affairs of the enterprise consisted of" seven numbered "racketeering acts," some of which were divided into lettered subparts. *Id.* ¶ 16 (emphasis added). These predicate acts were as follows:

- Act One, A: From 1987 through June 1988, Pizzonia, DiCongilio, and unnamed others conspired to murder Frank Boccia.

- Act One, B: In June 1988, Pizzonia, DiCongilio, and unnamed others murdered Frank Boccia.
- Act Two, A: From September 1992 through December 24, 1992, Pizzonia and unnamed others conspired to murder Rosemary and Thomas Uva.
- Act Two, B: On December 24, 1992, Pizzonia and unnamed others murdered Rosemary Uva.
- Act Three: On December 24, 1992, Pizzonia and unnamed others murdered Thomas Uva.
- Act Four: Between 1995 and 1996, Pizzonia and unnamed others conspired to use extortionate means to collect extensions of credit from John Doe # 1.
- Act Five: Between December 1999 and May 2000, Pizzonia and unnamed others conspired to use extortionate means to collect extensions of credit from John Doe # 2.
- Act Six, A: Between 2001 and June 2002, Pizzonia and unnamed others made extortionate extensions of credit to John Doe # 3.
- Act Six, B: Between 2001 and June 2002, Pizzonia and unnamed others used extortionate means to collect and attempt to collect an extension of credit from John Doe # 3.

- Act Seven, A: Between January 1994 and January 1996, Pizzonia, DiCongilio and unnamed others participated in an illegal gambling business.
- Act Seven, B: Between January 1994 and January 1996, Pizzonia, DiCongilio, and unnamed others profited from the same illegal gambling activity.

C. Trial

At trial, the prosecution offered extensive testimonial and physical evidence that convincingly established the existence of the charged enterprise; its moneymaking purpose; and its members' use of various criminal means to achieve that purpose and to protect the enterprise from internal disloyalty, outside rivalry, and law enforcement detection. Similarly, ample evidence was adduced demonstrating Pizzonia's association with the charged enterprise, including his induction as a "made" member of the Gambino family in 1988, and his eventual promotion to the role of "captain" in 2001. Because the sufficiency of this evidence is not challenged generally, but only as it pertains to the statute of limitations, we do not review it further except as necessary to address Pizzonia's timeliness challenge on appeal.

To establish Pizzonia's participation in a conspiracy to conduct the affairs of the Gambino family through a pattern of racketeering activity, the government sought to prove the charged predicate acts. The jury found proved Pizzonia's involvement in only two

of the seven acts: the 1992 conspiracy to murder Rosemary and Thomas Uva (Act Two, A) and the 1994-1996 substantive gambling offense (Act Seven, A and B).[2] While these crimes, on their face, may appear distinct and complete, the jury concluded from the totality of the evidence that, in fact, they manifested the relationship and continuity essential to form a pattern of racketeering. *See H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

Further, although the proved predicates ended well before May 26, 2000, the jury found that the charged racketeering conspiracy continued after that date and, specifically, into the limitations period. On this point, the district court instructed the jury that the government could not satisfy the statute of limitations simply by proving that the Gambino family continued to operate after May 26, 2000. The jury had to find that Pizzonia knowingly participated after that date in the charged conspiracy. Without objection, the court instructed the jury as follows:

> The statute of limitations for the racketeering conspiracy charged in Count One is five years. . . . As to defendant Pizzonia, you

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[2] The jury did not indicate whether it found that other members of the charged conspiracy committed any of the specified predicates within the limitations period. *See United States v. Yannotti*, 541 F.3d at 120, 122-23 (rejecting statute of limitations challenge where jury found timely predicate acts committed by other members of enterprise).

> must determine whether the RICO conspiracy charged in Count One, and Pizzonia's participation in the charged conspiracy, continued beyond May 26, 2000. Even if you find that the Gambino family existed beyond May 26, 2000, you must be satisfied beyond a reasonable doubt that defendant Pizzonia knowingly participated in the charged RICO conspiracy, that's Count One, beyond May 26, 2000.

Tr. at 4779-80. To confirm the jury's comprehension of this instruction, the court interrupted its delivery of the charge to ask: "Do you understand that, everybody?" *Id.* at 4780. It then noted on the record that "[e]verybody [on the jury] is nodding in agreement." *Id.*

Among the evidence offered by the government to prove Pizzonia's participation in the charged conspiracy after May 26, 2000, was testimony from former Gambino captain Michael DiLeonardo that, in late 2001 or 2002, Pizzonia, then also a captain, served on a Gambino family committee charged with the duty "to shake the trees," which DiLeonardo explained meant to increase the collection of proceeds from family members' illegal activities. *Id.* at 804-05, 913.

### D. Defendant's Rule 29 Motion for a Judgment of Acquittal

After the jury returned its verdict finding Pizzonia guilty of racketeering conspiracy, defendant moved for a judgment of acquittal pursuant to Fed. R.

Crim. P. 29 on the ground that the government's failure to prove a charged predicate act after May 26, 2000, necessarily precluded it from carrying its burden on the statute of limitations. The district court denied the motion, observing that ample record evidence supported a jury finding that both the charged conspiracy and Pizzonia's membership in it continued into the limitations period. *See* Sentencing Tr. at 12 (Sept. 5, 2007) ("[Pizzonia] never abandoned the conspiracy. He never withdrew from it. And the conspiracy continued up to and through the time of the trial.").

The district court sentenced Pizzonia principally to fifteen years' incarceration. This appeal followed.

## II. Discussion

### A. Standard of Review

Rule 29 of the Federal Rules of Criminal Procedure provides that, on a defendant's motion after verdict, the court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Pizzonia argues that the district court erred in denying his Rule 29 motion because the evidence was insufficient as a matter of law to prove the existence of the charged conspiracy or his participation in it anytime between May 26, 2000, and May 26, 2005, the relevant limitations period. Specifically, he asserts that by pleading that the pattern of racketeering activity "consisted of" the seven alleged predicate acts, the

Indictment so defined the scope of the charged conspiracy and, thus, temporally limited the conspiracy to the predicates. Because the proved predicate acts – the conspiracy to murder the Uvas, which concluded with their deaths on Christmas Eve, 1992; and the substantive gambling operation, which was alleged to have occurred between 1994 and 1996 – did not extend into the 2000-2005 limitations period, Pizzonia insists his conviction cannot stand.

We review the denial of a Rule 29 motion de novo, viewing the evidence in the light most favorable to the government. *See United States v. Amico,* 486 F.3d 764, 780 (2d Cir. 2007). Applying this standard, we reject Pizzonia's construction of the Indictment because it conflates the crime of conspiracy to violate RICO, *see* 18 U.S.C. § 1962(d), with the pattern element of the substantive RICO violation that the conspirators intended to commit, *see id.* § 1962(c). Like the district court, we conclude that, in proving the existence of the charged RICO conspiracy within the statute of limitations, the government was not limited to the predicate acts that were pleaded to demonstrate the intended pattern. We further conclude that the totality of the evidence permitted a reasonable jury to find that the charged conspiracy did continue beyond May 26, 2000, and therefore into the

limitations period. *See United States v. Abdulle*, 564 F.3d 119, 125 (2d Cir. 2009).[3]

### B. The Temporal Scope of the RICO Conspiracy Was Not Limited to the Charged or Proved Predicate Acts

RICO, specifically 18 U.S.C. § 1962(c), makes it a substantive crime "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1962(d), in turn, makes it "unlawful for any person to conspire to violate" the substantive provisions of RICO. When read in conjunction with the language of § 1962(c), RICO's conspiracy provision thus proscribes an agreement to conduct or to participate in the conduct of the enterprise's affairs through a pattern of racketeering activity.[4]

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[3] The trial court instructed the jury that "[t]he elements of a racketeering conspiracy . . . may be inferred from the various kinds of evidence before you. . . . You must determine whether, based on the entirety of the evidence, the government has proven that the defendant entered into the required conspiratorial agreement." Tr. at 4778-79.

[4] *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993), adopted an "operation or management" test to identify defendants who conducted or participated in the conduct of a racketeering enterprise for purposes of substantive RICO, *id.* at 182, 184. The test, however, does not apply to RICO

(Continued on following page)

Pizzonia does not challenge this articulation of the law. Rather, he contends that the prosecution narrowly defined the scope of the charged conspiracy by specifying in the Indictment that the pattern of racketeering activity "consisted of" seven enumerated predicate acts. Pizzonia submits that, on such a pleading, a conspiracy to participate in the affairs of an enterprise through a pattern of racketeering cannot, as a matter of law, temporally extend beyond the commission of the last proved predicate. We are not persuaded.

At the outset, we note that the Indictment alleges that the pattern of racketeering activity – not the conspiracy itself – consisted of the specified predicates: "The pattern of racketeering activity through which the defendants Dominick Pizzonia and Alfred DiCongilio agreed to conduct the affairs of the enterprise consisted of the racketeering acts set forth below as racketeering acts one through seven of this Superseding Indictment." *See* Indictment ¶ 16. The distinction is significant. As this court emphasized in *United States v. Persico,* 832 F.2d 705 (2d Cir. 1987), "the agreement proscribed by section 1962(d) is [a] conspiracy to participate in a charged enterprise's

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conspiracy. *See United States v. Zichettello,* 208 F.3d 72, 99 (2d Cir. 2000). A defendant whose role in a racketeering conspiracy does not involve operation or management may be guilty under § 1962(d) where he "'know[s] the general nature of the conspiracy and that the conspiracy extends beyond [his] individual role.'" *Id.* (quoting *United States v. Rastelli,* 870 F.2d 822, 828 (2d Cir. 1989)).

affairs" through a pattern of racketeering, "not [a] conspiracy to commit predicate acts," *id.* at 713. Thus, in *Persico,* even though "the last predicate acts ascribable to [the defendants] occurred more than five years prior to the date of the indictment," *id.,* we concluded from the totality of the evidence that "the government amply demonstrated that the conspiracy to conduct the affairs" of the enterprise charged in that case "continued until, and well after . . . the date the superseding indictment was filed," *id.* at 713-14. On that basis, we upheld the defendants' convictions for RICO conspiracy.[5]

Just as the evidence used to establish the enterprise and pattern elements "may in particular cases coalesce," *United States v. Turkette,* 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981); *see also United States v. Eppolito,* 543 F.3d 25, 50 (2d Cir. 2008), so too may the evidence used to prove those elements and a conspiratorial agreement to engage in racketeering, *see United States v. Martino,* 648 F.2d 367, 382-83 (5th Cir. 1981) ("Prosecution of RICO substantive and conspiracy charges expectedly involves

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[5] In a recent unpublished summary order, this court relied on *Persico* to reject the argument that "the goals of the charged conspiracy were limited to or exclusively defined by the predicate acts alleged in the indictment." *United States v. Soto,* 269 F. App'x 22, 24 (2d Cir. 2008). We identified "no error in the use of uncharged acts to prove that the RICO conspiracy charge was not time-barred" and, in reaching this conclusion, distinguished a racketeering conspiracy from the pattern element of RICO, *id.,* much as we do in this opinion.

considerable overlap in the evidence." (citing *Iannelli v. United States,* 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975))). The concepts of racketeering conspiracy, enterprise, and pattern, however, are not interchangeable. As we explained in *United States v. Russotti,* 717 F.2d 27 (2d Cir. 1983), "it is neither the enterprise standing alone nor the pattern of racketeering activity by itself which RICO criminalizes," but "[r]ather, the combination of these two elements," *id.* at 33 (emphasis omitted). It follows, then, that the pattern element of racketeering cannot by itself define a § 1962(d) conspiracy. To understand the scope of the jointly undertaken scheme, one must also consider the enterprise that the conspirators agreed to conduct through a pattern of racketeering. In short, a RICO conspiracy is never simply an agreement to commit specified predicate acts that allegedly form a pattern of racketeering. Nor is it merely an agreement to join in a particular enterprise. Rather, it is an agreement to conduct or to participate in the conduct of a charged enterprise's affairs *through* a pattern of racketeering. *See United States v. Persico,* 832 F.2d at 713. For that reason, while a RICO conspiracy's existence within the statute of limitations may well be proved by evidence of predicate acts occurring within the limitations period, *see United States v. Yannotti,* 541 F.3d at 122-23 (observing that proof of predicate acts by co-conspirators established continuation of charged conspiracy into limitations period), that is not the only means by which the law's temporal requirement can be satisfied, *see United States v. Persico,* 832 F.2d at 713.

Pizzonia nevertheless insists that by specifying in the Indictment that the pattern of racketeering "consists of" the seven enumerated predicate acts, the government necessarily limited the scope of the charged racketeering conspiracy. We recognize that the pleading represents no casual choice of language by the prosecution. A Department of Justice manual specifically instructs prosecutors that "[t]he pattern of racketeering should be drafted to allege that it 'consists of' rather than 'includes' the acts of racketeering to avoid double jeopardy problems in the event a RICO defendant is charged with a subsequent RICO violation." U.S. Dep't of Justice, Racketeer Influenced & Corrupt Organizations, A Manual for Federal Prosecutors 222 (4th rev. ed. 2000) (footnotes omitted).

We express no opinion as to whether this pleading practice will, in fact, avoid the identified double jeopardy concerns. We note simply that the question may not admit a ready answer. Although our court has indicated that if either the enterprise or the pattern at issue in successive RICO prosecutions is different, "there is no infirmity under the *double jeopardy clause*," *United States v. Russotti,* 717 F.2d at 33, we have not relied on predicates alone to distinguish patterns of racketeering. Rather, we have identified a five-factor test – essentially looking to the totality of the circumstances – to determine whether two RICO counts charge distinct patterns of racketeering activity:

> (1) the time of the various activities charged as parts of separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place under each charge.

*Id.* Our sister circuits have adopted similar holistic approaches. *See United States v. Wheeler,* 535 F.3d 446, 449-50 (6th Cir. 2008) (concluding from application of *Russotti* factors that successive prosecutions involved same pattern of racketeering despite some differences in predicate acts); *United States v. DeCologero,* 530 F.3d 36, 71 (1st Cir. 2008) ("In comparing the charged patterns of racketeering, we consider the totality of the circumstances, including the similarities of the time, the place, the people, and the nature and scope of the activities involved in each indictment." (internal quotation marks deleted)); *United States v. Calabrese,* 490 F.3d 575, 581 (7th Cir. 2007); *United States v. Cole,* 293 F.3d 153, 158 (4th Cir. 2002); *United States v. Smith,* 82 F.3d 1261, 1267 (3d Cir. 1996); *United States v. Petty,* 62 F.3d 265, 267 (8th Cir. 1995); *United States v. Beszborn,* 21 F.3d 62, 69 (5th Cir. 1994) (observing that double jeopardy challenge to RICO prosecutions required court to "review the entire record" in view of same five factors outlined in *Russotti*); *United States v. Ruggiero,* 754 F.2d 927, 932-33 (11th Cir. 1985).

This totality-of-the-circumstances approach to identifying a pattern of racketeering is in accord with the rationale underlying RICO's pattern requirement. "Congress was concerned in RICO with long-term criminal conduct." *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. at 242. RICO's pattern element thus serves to ensure that a defendant's criminal participation in an enterprise is not merely isolated or sporadic, but indicative of the sort of continuity of criminal activity – or the threat of continuity – that is the hallmark of racketeering. *See id.* at 239, 242; *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 n.14, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (discussing continuity aspect of pattern element); *United States v. Eppolito,* 543 F.3d at 50-51 (noting that pattern element signals Congress's intent to exclude "isolated" or "sporadic" criminal activity from the definition of racketeering). Although no less than two predicate acts must be committed – or, in the case of RICO conspiracy, agreed to, *see United States v. Persico,* 832 F.2d at 713 – to demonstrate a pattern of racketeering, in the end, it is not the number of predicates proved but, rather, "the relationship that they bear to each other or to some external organizing principle" that indicates whether they manifest the continuity required to prove a pattern, *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. at 238.

Indeed, the continuity aspect of RICO's pattern element explains why we reject Pizzonia's argument that the charged conspiracy necessarily achieved its objective with the completion of the two proved

predicates, i.e., the Uva murders and the gambling operation. To explain, we begin by reviewing some basic principles relevant to the concept of RICO "continuity." The law recognizes RICO "continuity" to be "both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. Continuity over a closed period – which is not present in this case – may be proved by "a series of related predicates extending over a substantial period of time." *Id.* at 242. Over an open period, however, continuity may be proved even by a small number of predicates, or by ones occurring close together in time, if "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." *Id.* (noting that implicit in extortionate demands for monthly payments from storeowners in return for "insurance" against broken windows was the threat of continued demands). Alternatively, the threat of continued criminal activity over an open period can be established where discrete predicates "can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.* at 243. This is such a case. Long-term criminal associations plainly include "those traditionally grouped under the phrase 'organized crime,'" *id.*, of which the Gambino crime family is an example, *see United States v. Yannotti*, 541 F.3d at 115-16. As the Indictment asserts, the Gambino family exists for the purpose of making money from a wide variety of criminal activities. Further, the family uses crime, notably

violent crime, to protect its money-making operations. Thus, an agreement to participate in the affairs of such an enterprise through a pattern of racketeering activity, even one manifested by only two predicate acts, poses an open-ended risk of continuing criminal conduct that does not necessarily conclude with the last pleaded predicate. This is not to foreclose the possibility of racketeering conspiracies with limited objectives even within organized crime enterprises. We hold only that where, as here, the affairs of the enterprise in which a defendant agreed to participate through a pattern of racketeering are broadly defined to encompass all its criminal money-making objectives and all means used to protect those objectives, the conspiracy does not end, as a matter of law, with the last proved predicate.

This conclusion comports with the law's general recognition of conspiracy as a "continuing crime," that is "not complete until the purposes of the conspiracy have been accomplished or abandoned." *See United States v. Eppolito,* 543 F.3d at 47 (internal quotation marks omitted). As we have already noted, the purpose of a RICO conspiracy is to conduct or to participate in the conduct of a charged enterprise's affairs, "not . . . to commit predicate acts." *United States v. Persico,* 832 F.2d at 713. Thus, whether a pattern is pleaded to have "consisted of" or "included" specified predicate acts, the completion of those predicates does not, as a matter of law, dictate the end of the pattern, much less the attainment or abandonment of the conspiracy's overall objective. To the contrary,

once the government presents sufficient evidence to show the existence of a conspiracy having a continuing purpose – in this case, earning money for the Gambino family through various criminal activities – the law presumes the continued existence of the conspiracy and places "the burden . . . on the defendant to prove that the conspiracy was terminated or that he took affirmative steps to withdraw." *United States v. Eppolito,* 543 F.3d at 49; *see United States v. Yannotti,* 541 F.3d at 123; *United States v. Spero,* 331 F.3d 57, 60 (2d Cir. 2003).

This presumption was not, however, employed in this case. Judge Weinstein instructed the jury that the government had to adduce further evidence that the charged conspiracy and Pizzonia's participation in it continued into the limitations period. While this participation did not have to be a specified predicate act, it had to be attributable to Pizzonia himself and not simply to other members of the charged conspiracy, a narrower view of § 1962(d) than we recently endorsed in *United States v. Yannotti,* 541 F.3d at 122. For reasons discussed in the next section, we conclude that the evidence was sufficient to support a jury finding that the government carried this burden of proving Pizzonia's continued participation in the conspiracy. We here hold simply that the Indictment's pleading that a pattern "consisted of" specified predicate acts (1) did not preclude a jury from considering those predicates in light of the totality of the evidence to determine whether they manifested a pattern of continuing criminal activity through which the

conspirators agreed to conduct the enterprise's affairs and, accordingly, (2) did not limit the temporal scope of the charged racketeering conspiracy to the time-frame of those predicates.[6]

C. Evidence of Conspiracy Within the Limitations Period

At oral argument, Pizzonia's counsel indicated that his sufficiency challenge was limited to the government's inability to prove a predicate act within the limitations period. While this concession waives any broader sufficiency challenge, *see United States v. Polouizzi,* 564 F.3d 142, 153 (2d Cir. 2009), we note that such an argument would, in any event, fail on its merits.

Pizzonia effectively concedes that the evidence was sufficient to permit a reasonable jury to find proved the charged conspiracy and his participation in it before May 26, 2000. Against that background, even when we set aside evidence pertaining to acquitted counts or predicates found not proved, our independent review of the totality of the remainder of

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[6] In light of this ruling, no further discussion is necessary for us to reject as meritless Pizzonia's argument that Judge Weinstein constructively amended the charged conspiracy by allowing the jury to consider its continuance beyond the last proved predicate. Because no objection to the charge was raised in the district court, our review on this point would, in any event, be limited to plain error. *See United States v. Weintraub,* 273 F.3d 139, 145 (2d Cir. 2001).

the record, viewed in the light most favorable to the government, *see United States v. Amico,* 486 F.3d at 780, leads us to reach the same conclusion as the district court: ample evidence demonstrated Pizzonia's continued participation in that conspiracy after May 26, 2000. Most obviously, evidence was adduced that, in 2001, Pizzonia held the rank of captain in the Gambino crime family. In that capacity, he sat on a special committee that sought to increase family revenues from the Gambinos' assorted criminal activities. It is difficult to imagine evidence that could more convincingly demonstrate a defendant's agreement to participate in the affairs of the charged enterprise through a pattern of continuing criminal activity.

Accordingly, we conclude that the district court correctly denied Pizzonia's Rule 29 motion for a judgment of acquittal.

## III. Conclusion

To summarize, we conclude

1. Even though the pattern of racketeering was alleged to have "consisted of" specified predicate acts, neither that pattern nor those predicates defined the scope of the charged RICO conspiracy so as to require proof of a predicate within the statute of limitations to support conviction.

2. Although the last proved predicate concluded before the limitations period, a reasonable jury could have concluded from

the totality of the evidence that the charged racketeering conspiracy and Pizzonia's participation in that conspiracy continued into the limitations period.

Accordingly, we AFFIRM the judgment of conviction.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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|---|---|
| UNITED STATES OF AMERICA, | **Docket #** 05-cr-425 (JBW) |
| – versus – | U.S. Courthouse Brooklyn, New York |
| DOMINICK PIZZONIA, Defendant | September 5, 2007 |

TRANSCRIPT OF CRIMINAL CAUSE
FOR SENTENCING
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

(Filed Sep. 13, 2007)

* * *

[11] **Proceedings**

* * *

THE COURT: The defendant moves for a judgment of acquittal on the ground that the evidence is insufficient to sustain a conviction, namely, that the statute of limitations applies as a matter of fact and law. Such a motion may be made or renewed within seven days after a guilty verdict. It has been made in a timely manner in this case.

[12] The motion is denied. There's ample basis in the cases and in the facts to show that the defendant continued to be a member of this conspiracy. He was a lifelong member. He never abandoned the conspiracy.

He never withdrew from it. And the conspiracy continued up to and through the time of the trial.

* * *